UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN A. BOEHNER,	)
	)
Plaintiff,	)
	)
v.	) **Civ. No. 98-594 (TFH)**
	)
JAMES A. MCDERMOTT,	)
	)
Defendant.	)

MEMORANDUM OPINION

Pending before the Court is defendant's motion to dismiss. The Court held a hearing on this motion on July 17, 1998. After considering the arguments made by each party in pleadings and at the hearing, the Court will grant defendant's motion.

I Background

This case arises out of the unfortunate acrimony, absence of civility, and shortage of honor, that pervades the partisan sniping between some members of Congress and their supporters. Plaintiff John Boehner is a Republican member of the House of Representatives, representing the Eighth District of Ohio, who serves as the Chairman of the House Republican Conference. Defendant James McDermott is Democratic member of the House, representing the Seventh District of Washington. Rep. McDermott had served as the ranking Democrat on the House Committee on Standards of Official Conduct (The "House Ethics Committee"), although he resigned that post in the maelstrom that underlies this lawsuit.

The origins of this case lie in a conference call between several House Republican

leaders, on December 21, 1996, during which the Congressmen discussed potential responses to the House Ethics Committee probe of House Speaker Newt Gingrich. Engaged in the conversation were, among others, Speaker Gingrich, Rep. Richard Armey, and plaintiff, who was participating from Florida. Plaintiff participated in the call from a restaurant parking lot, and he participated via a cellular telephone.[1]

A Florida couple, Alice and John Martin, were monitoring the police scanner in their car-- allegedly while tailing plaintiff's automobile-- and intercepted and taped plaintiff's cellular transmission. After determining that the content of the transmission could be damaging to House Republicans, the Martins delivered a tape of the conversation to the office of their representative, Kay Thurman, a Democrat. In January 1997, Rep. Thurman discussed the tape with aides to Rep. David Bonior, a Democrat and Minority Whip of the House; shortly thereafter, Rep. Thurman advised the Martins to deliver a copy of the tape to defendant.

On January 8, 1997, while in Washington for the swearing-in of a new Democratic member of Congress, the Martins delivered a copy to defendant's office, along with a letter in which they explained the origins of the tape. In that same letter, the Martins expressed their understanding, supposedly derived from Rep. Thurman, that defendant would arrange for them

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[1] Defendant seeks dismissal under Federal Rule of Civil Procedure 12, so the Court must accept the facts alleged in the Complaint as true. See Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979). Because the Court has only these facts before it, and because it must accept them as true for purposes of this motion, the Court bases its factual summary on the allegations contained in plaintiff's Complaint. The summary is only of alleged facts, and does not represent any factual finding by the Court.

to receive immunity from criminal prosecution. The Martins did not deliver copies to any other members of the House Ethics Committee. Rep. McDermott accepted the tape and the letter. Sometime before January 10, 1997, his office gave copies of the tape to at least three newspapers-- The New York Times, The Atlanta Journal-Constitution, and Roll Call. The New York Times broke its story on the front page of its January 10, 1997, edition.

On January 13, 1997, the Martins called a press conference, at which they asserted that they had intercepted plaintiff's conversation and delivered a tape of the conversation to defendant's office. Only after the Martins' press conference did defendant finally deliver copies of the taped conversation to other members of the House Ethics Committee. Defendant resigned from the Committee on the same day. Upon receiving her copy of the tape, Rep. Nancy L. Johnson, a Republican and Chair of the House Ethics Committee, delivered a copy to the United States Department of Justice.

The Justice Department investigated the matter, and the U.S. Attorney charged the Martins with misdemeanor unlawful interception of a cellular telephone call, in violation of 18 U.S.C. §§2511(1)(a), 2511(4)(b)(ii). Each Martin pled guilty on April 23, 1997, and each was eventually fined $500 for the offense. Although plaintiff pressed for stiffer prosecution, no further charges have been brought against the Martins, or against anyone else. The Department of Justice issued a press release, stating that stiffer prosecution was unwarranted, because the Martins did not seek to use the intercepted conversation for commercial purposes.

In February 1998, plaintiff sought and received authorization from the Federal Election Commission to use campaign funds to finance a civil lawsuit. The Commission concluded that the finance arrangement was justified because the situation "resulted directly from the pursuit

of [plaintiff's] duties as a federal officeholder." Federal Election Commission Advisory Opinion 1997-27, Feb. 23, 1998, at 3. The FEC further concluded that interest in the conversation derived solely from the participants and subject matter involved, in which plaintiff was embroiled only because of his office. Id. Therefore, since the lawsuit was a public matter, and since plaintiff would not receive any financial benefit himself, the FEC advised plaintiff to use campaign funds to launch the suit.

Plaintiff filed his Complaint with the Court on March 9, 1998. The Complaint alleges that defendant knowingly disclosed an unlawfully intercepted communication, in violation of the federal wiretapping statute. 18 U.S.C. §§ 2511 (c), 2520. It also alleges that defendant violated the Florida wiretapping statute, which is patterned after the federal statute. Fla. Stat. §§934.03(c), 934.10.

Defendant has moved to dismiss the Complaint under Rule 12, for failure to state a claim.

II Motion to Dismiss

A motion to dismiss is appropriate only if it is evident that no relief could be granted under any set of facts that could be proven to support the allegations made by the plaintiff in the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Martin v. Ezeagu, 816 F. Supp. 20, 23 (D.D.C. 1993). In evaluating a motion to dismiss, the Court must construe the complaint in the light most favorable to plaintiff and give the plaintiff "the benefit of all inferences that can be derived from the facts alleged." Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979).

III Discussion

Plaintiff's Complaint contains two counts-- one count each for violations of federal and Florida state statutes. Federal law prohibits the intentional disclosure of "the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(c). The Florida statute contains almost exactly the same language. Fla. Stat. §§934.03(c). The federal and state statutes also confer a civil cause of action on anyone whose communication is "intercepted, disclosed, or intentionally used" in violation of the chapter. 18 U.S.C. § 2520(a). See also Fla. Stat. §§ 934.10(1). The statutes provide for "such relief as may be appropriate," including equitable relief, compensatory, statutory, and punitive damages, and attorneys' fees. 18 U.S.C. § 2520(a), (b), (c); Fla. Stat. § 934.10(1).

There is no real dispute that plaintiff has stated a claim for liability under the terms of these statutes. The Martins unlawfully intercepted the cellular communication, in violation of 18 U.S.C. § 2511(a) and Fla. Stat. §§ 934.03(a), and they have been convicted for doing so. Plaintiff's Complaint alleges that defendant knew or should have known that the Martins' tape was illegally acquired. The Complaint also alleges that defendant disclosed the contents of the tape, even though he knew of its illicit origin. Therefore, plaintiff has stated a claim that defendant violated § 2511(c) and § 934.03(c), and he has stated a claim for civil liability under § 2520 and § 934.10.

Defendant argues, however, that the First Amendment precludes a finding of liability

against him.[2] He asserts that the government may not restrict individuals from disclosing truthful information about a matter of public significance that is lawfully obtained, absent a need to further a state interest of the highest order. The Florida Star v. B.J.F., 491 U.S. 524, 533 (1989); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979). Thus, defendant argues that this restriction on his exercise of free speech must be examined under a standard of strict scrutiny, and that the government interests are insufficient to withstand that scrutiny.

Defendant's argument can be divided into three parts.[3] First, the Court must determine whether the taped conversation was "lawfully obtained." Second, the Court must determine the level of scrutiny that applies to the statutes' restriction on defendant's speech. Finally, the Court must determine whether the government's interests at stake in this case are sufficient to overcome the applicable level of scrutiny.

A. Defendant's Access to Taped Conversation

Defendant argues that strict scrutiny applies to information that is "lawfully obtained;" therefore, the Court must determine whether the tape of Rep. Boehner's cellular conversation meets that description. There is no debate that, in the Martins' hands, it was not lawfully obtained-- the Martins have each pled guilty to unlawfully intercepting the conversation.

Rep. McDermott argues, however, that the statute cannot and does not impute the

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[2] Defendant also argues that the Florida statute cannot apply to him, because it does not apply to actions that occurred outside Florida's borders. Because the Court will dismiss both counts on First Amendment grounds, it need not address this argument.

[3] Because the federal and Florida statutes are, for all relevant purposes, identical, the Court will not distinguish between them in its analysis.

Martins' criminal behavior to him. The Complaint contains no allegation that defendant directed the Martins' actions, or that he was otherwise complicit in their crime. Furthermore, although plaintiff alleges that defendant was aware of the tape's origin, he does not allege that defendant was aware of the tape's existence until the Martins dropped it on his doorstep.

Rep. McDermott argues that, while others may have unlawfully obtained the tape, his acquisition itself was itself lawful, and therefore that the tape was lawfully obtained in his hands.[4] Defendant's theory is a slippery one, as it not only defends, but even encourages, the circumnavigation of wiretap statutes, which are designed to prevent the disclosure of private conversations. Under defendant's theory, the state has no means to prevent disclosure of private information, because criminals like the Martins can literally launder illegally intercepted information. Pursuant to defendant's theory, a criminal may steal a conversation and give it to someone else, who could then disseminate the information with impunity. Given the almost laughable sentence imposed upon the Martin's for the initial crime, there remains almost no force to deter exposure of any intercepted secret; unless illicit recordings are considered unlawfully obtained in the hands of persons other than the initial eavesdroppers and their conspirators, the effect of the statute is diluted into nothingness.

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[4] Rep. McDermott also suggests, but does not wholeheartedly pursue, and alternate theory, based on the Speech and Debate Clause of the Constitution. Pursuant to that clause, a member of Congress may use any material, even if illegally obtained, for purposes consistent with his legislative duties. See Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 417 (D.C. Cir. 1995) (Use of stolen documents by subcommittee is privileged). Because the Court finds that defendant "lawfully obtained" the taped conversation, it need not reach this argument, although it is highly suspect that defendant's disclosure of the tape to the press, in the pursuit of partisan gain, can be considered a purpose consistent with his legislative duties.

While defendant's actions and arguments lay siege to the protections against illicit wiretapping that Congress and the Florida legislatures have erected, however, defendant has successfully located and exploited the loopholes in those protections. The federal and state statutes give no indication that the taped conversation is considered unlawfully obtained by defendant. Although the wiretap statutes prohibit the Martin's interception, and the Martin's disclosure of the tape to Reps. Thurman and McDermott, they do not prohibit Rep. McDermott's receipt of the tape. Because defendant did not break any laws in taking possession of the tape, he lawfully obtained that information, in a literal sense.

Similarly, the relevant caselaw seems to suggest that information not illegally acquired is lawfully obtained, even though its source may have obtained it illegally. For example, in the Florida Star case, the Duval County Sheriff's Department inadvertently published the name of a rape victim on a public blotter sheet, even though a state statute prohibited publication of such information. The police department was unquestionably liable for breaking the law, and it eventually settled a suit against it; however, the Supreme Court held that newspapers publishing the name were not liable. In holding the papers free from liability, the Court held that the information taken off the police blotter, to which the press had lawful access, was lawfully obtained by the newspapers. Florida Star, 491 U.S. at 534.

Although the situation in the present case is somewhat different from Florida Star-- for example, Rep. McDermott obtained his information from a private source, which had stolen it, not from the government, which had inadvertently released it-- neither statute nor caselaw[5]

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[5] Plaintiff argues that New York Times Co. v. United States, 403 U.S. 713 (1971) supports his contention that this information was unlawfully obtained. In

provides substantial basis to conclude that defendant unlawfully obtained the taped conversation.

The wiretap statutes appear to contemplate that the taped conversation in this case was unlawfully obtained, since it was stolen in a most unscrupulous, underhanded fashion. Logic suggests that a criminal cannot launder the stains off illegally obtained property simply by giving it to someone else, when that other person is aware of its origins. The First Amendment caselaw does not seem to adopt this logic, however, and it suggests that information, even if initially garnered through illegal means, is lawfully obtained by anyone who did not himself break the law to obtain it. Although the Court finds this interpretation illogical, and, even worse, suspects that it effectively undermines the protection that wiretap statutes supposedly afford, the Court is bound to accept and follow it; thus, plaintiff has not pled facts to suggest that the stolen conversation was unlawfully obtained in defendant's hands.

B. Standard of Scrutiny

While the federal and state statutes clearly prohibit defendant's actions, at least as those

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that case, which concerned the Pentagon Papers, the Times published sensitive documents stolen by Daniel Elsberg. While the Court refused to erect a prepublication barrier against disclosure, four justices suggested that the newspaper might later be held liable for publishing the illicit documents. New York Times, 403 U.S. at 730, 736-37, 745, 752 (White, J., joined by Stewart, J., concurring, Marshall, J., concurring, Burger, C.J., dissenting). Thus, these statements suggest that the documents might be considered unlawfully obtained by the Times, even though the paper itself did not steal them. However, the justices' observations, though instructive, were made in dicta, and no more solid precedent has been set, since the newspapers were never sued or prosecuted on this theory. Therefore, the Court does not find that these statements are sufficient to overcome the more established inferences created under Florida Star.

actions are alleged in plaintiff's Complaint, defendant argues that this prohibition violates the First Amendment's protections for free exercise of speech. Defendant's argument demands scrutiny of these wiretap statutes, at least as applied in this case, but the parties dispute the level of scrutiny appropriate for this case.

The lead authority, discussed by both parties, on this issue is The Florida Star v. B.J.F., 491 U.S. 524 (1989). In that case, the Supreme Court held that a newspaper was not liable for publishing the name of a rape victim, which was inadvertently released to the press by the police, even though such publication was prohibited by statute. The Court analyzed the statute under the strict principle that the First Amendment prevents sanction for publishing truthful, lawfully acquired, information of public significance, absent a state interest of the highest order. Florida Star, 491 U.S. at 533. Pursuant to that strict scrutiny, the Court held that the statute could not punish the newspaper for its actions.

The Supreme Court has adopted this strict standard in several other cases involving illegal disclosure of lawfully obtained information. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) the Court vacated a civil damage award against a station that broadcast the name of a rape murder victim, which it had lawfully obtained from public courthouse records. In Oklahoma Publishing Co. v. Oklahoma County, 430 U.S. 308 (1977), the Court refused to enjoin publication of the name and photograph of an 11-year old boy, when the paper had obtained the information at a public juvenile proceeding. Finally, in Smith v. Daily Mail, 443 U.S. 97 (1979), the Court vacated the indictment of two newspapers for publishing the name of a juvenile offender, which they learned while legally monitoring a police band radio frequency. In each of these cases, the Court applied strict scrutiny to restrictions on disclosure

of truthful, lawfully acquired information.

Plaintiff cites several cases in which restrictions on disclosure of truthful, lawfully obtained information were subjected to a diminished scrutiny, and in which punishments for that disclosure were upheld. In United States v. Aguilar, 515 U.S. 593 (1995) the Court upheld the conviction of a federal judge, who disclosed the existence of a wiretap to the object of the surveillance, in violation of federal law. In that case, there was no question that the judge had lawfully obtained the information, or that the information was true, but his punishment was affirmed under somewhat forgiving scrutiny. In Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), the Court upheld a protective order that prohibited a litigant from disclosing information acquired in discovery, even though the litigant lawfully obtained the information. 467 U.S. at 32-34. In Snepp v. United States, 444 U.S. 507 (1980), the Court upheld a judgment against a former CIA agent, who wrote a book and disclosed secrets that he had acquired, lawfully, on the job. Finally, in Cohen v. Cowles Media Co., 501 U.S. 663 (1991), the Court upheld a judgment against a newspaper that printed the identity of a confidential source, to whom it had promised anonymity. Each of these cases involved the restriction of information that was truthful, lawfully acquired, and of public interest, and in each case, the Court analyzed the case under a diminished standard of scrutiny.

The cases cited by plaintiff are easily distinguished from the present case, however, and from the general principle announced in Florida Star and Daily Mail. In each of plaintiff's examples, information was lawfully obtained only pursuant to a duty not to disclose; thus, in each case, the statute at issue merely enforced a pre-existing, independent prohibition against disclosure, without which the information could not have been lawfully obtained. For

example, Judge Aguilar could not have acquired his wiretap information without taking his oath of office, which precluded disclosure, and Snepp acquired his secrets only through his employment with the CIA. Similarly, the litigants in Seattle Times voluntarily assumed a duty not to disclose information acquired during discovery, and the newspaper in Cohen acquired the name, and statements, of its confidential source only after promising anonymity. In none of these cases did the relevant statute itself create any restriction against disclosure; each statute merely enforced a duty that was already there, independently.

In contrast, the present case, like the Florida Star line of cases, involves no such independent duty not to disclose information; the restriction on disclosure derives solely from the federal and state statutes themselves. Thus, the standard of Florida Star is better applied than that of Aguilar, and the other cases urged by plaintiff .

In the present case, there is no dispute that defendant disclosed only information that was truthful and of public interest, and, as the Court has discussed above, defendant lawfully obtained the information. Therefore, following Florida Star, the Court must examine the application of the wiretap statutes with strict scrutiny.[6]

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[6] Only one other district court has considered the application of 18 U.S.C. § 2510 to a situation like the present one. In Peavy v. New Times, Inc, 976 F.Supp. 532 (N.D. Tex. 1997), the court concluded that the First Amendment bars prosecution under § 2510 for publication of a telephone conversation, which the paper obtained at a public school board meeting, but which had been illegally obtained by someone else. In contrast, one state court has taken the opposite view, that media organizations may be held civilly liable for disclosure of conversations that they obtained from sources who had engaged in illegal wiretapping and eavesdropping. See Natoli v. Sullivan, 606 N.Y.S.2d 504 (N.Y. Sup. 1993), aff'd 616 N.Y.S.2d 318 (N.Y. App. Div. 1994). While neither of these cases is binding authority, the Florida Star line of cases obliges the Court to arrive at the same conclusion as Peavy.

C. Scrutiny of the Wiretapping Statutes

Given the facts of this case, the government may restrict defendant's exercise of speech only through a statute that furthers "a state interest of the highest order."[7] Florida Star, 491 U.S. at 541. Defendant argues both that the general government interest in regulating disclosure of wiretapped information is insufficient to leap this formidable hurdle, and that the particular facts of this case diminish the interests at stake, so that application of the statutes to this particular disclosure cannot meet constitutional standards.

The primary purpose of the federal wiretap statute is to "control the conditions under which interception will be permitted in order to safeguard the privacy of wire and oral communications." Lam Lek Chong v. United States Drug Enforcement Agency., 929 F.2d 729, 732 (D.C. Cir. 1991)(Citing S.Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968)). See also Gelbard v. United States, 408 U.S. 41, 48 (1972). Congress has therefore placed substantial value on the privacy interests of users of telephones and other electronic, oral, and wire communication facilities, and has stated its intention to protect these interests from unscrupulous interlopers, such as the Martins.

Although protection of privacy is certainly a substantial government interest, it is not clear that it is an interest "of the highest order," such that it can trump defendant's First Amendment rights. The rape victims in Florida Star and Cox Broadcasting each had a substantial interest in privacy and anonymity, yet that interest was insufficient to overcome the

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[7] The statute must also be "narrowly tailored" to further that interest. Florida Star, 491 U.S. at 541. Because the Court finds that there is not a sufficient interest to support this restriction on speech, it need not consider whether the statute is so tailored.

First Amendment rights of the entities that printed or broadcast their names. Taking these cases as models for the present one, the Court cannot see how the government interest in protecting privacy of wire, electronic or oral communication is of any higher order than the protection of privacy for rape victims.

Furthermore, the circumstances of the present case suggest that the government interest in protecting the privacy of this particular plaintiff, in this particular situation, is diminished. Plaintiff does not claim to have suffered any direct injury-- he makes no claim for compensatory damages, as the plaintiff in Florida Star did, but sues only for statutory and punitive damages, from which he cannot himself benefit.[8] Thus, plaintiff seeks less to strike a blow for his personal privacy rights than he does to fire a salvo in the partisan battle between rival groups in the House of Representatives. For this reason, the interest in protection of privacy is diminished in this case.

The Florida Star line of cases demonstrates that the privacy interests at stake in this case, while not insubstantial, are insufficient to overcome defendant's First Amendment rights. It is uncertain that the wiretap statutes could survive strict scrutiny in any case, since Florida Star demonstrates that not even a rape victim's interest in anonymity is sufficient to overcome that hurdle, but they certainly cannot survive scrutiny given the circumstances of the present case, which involves more partisan skirmishing than it does true vindication of privacy interests.

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[8] Plaintiff has financed this litigation with campaign funds, and the FEC ruling makes clear that plaintiff cannot personally share in any award.

D. Conclusion

The First Amendment prevents the government from punishing the disclosure of truthful, lawfully obtained information of public significance. It is unfortunate that a United States Representative, who had chosen a position that supposedly illuminated him as a beacon of ethical behavior,[9] should so eagerly seek to capitalize on the skulduggery of would-be party operatives to win petty, partisan victories in the press. The First Amendment is largely blind to motives, however, and it offers protection not only to the noble, but also to the ignoble. Thus, Rep. McDermott's actions are protected under the Amendment, and the Court must grant his motion to dismiss.

An order will accompany this opinion.

July _____, 1998

Thomas F. Hogan
United States District Judge

[9] Rep. McDermott resigned his position on the House Ethics Committee when his disclosure of the illicitly taped conversation became public.